MORELAND ET AL. *vs.* PELHAM.

A writ of garnishment may be against several, where the writ, allegations and interrogatories show a joint indebtedness and a joint possession of goods, &c.

Such writ may be executed on the return day thereof.

The allegations and interrogatories may be filed with the clerk before the expiration of the return day of the writ, and need not be entered of record.

The failure to enter the continuance of a cause is no discontinuance of the action.

Writ of Error to the Circuit Court of Marion County.

Garnishment. The facts are stated in the opinion of this court.

D. WALKER, for plaintiffs. In this case a writ of garnishment issued against the plaintiffs without showing a joint debt or liability, and appears to have been served on the return day thereof. Plaintiffs contend that the service was not good; but if good, this is in the nature of an original action, and in order to charge them jointly the writ should have shown a joint liability. This point is distinctly settled in the case of *Thorn & Robins vs. Woodruff et al.* 5 *Ark. R.* 55.

They were summoned to answer with regard to a judgment alleged to have been rendered on the 7th April 1839, and judgment was taken to satisfy a judgment rendered on the 17th April 1839 This is a fatal variance and shows a different indebtedness from that disclosed in the writ.

There never were interrogatories filed in the case. In order to constitute a filing the record must show the fact. This has been repeatedly decided by this court, and although there is a paper with the records purporting to be part thereof they will not be so considered unless noted on the record as being filed.

BYERS & PATTERSON, contra.

CONWAY B, J. In April 1839, Charles H. Pelham obtained a judgment in the Marion circuit court against Jesse N. Everett. On the 21st of May 1842 he sued out a writ of garnishment on this judgment against Alexander and William Moreland as garnishees. The writ was made returnable the first day of the succeeding October term and the sheriff executed it on its return day. The same day Pelham filed with the clerk his allegations and interrogatories against the garnishees. At the April term of the court 1845, garnishees were called, and making default and having failed to answer, Pelham took judgment against them for the amount of his

judgment against Everett, and the garnishees have brought the case here by writ of error.

The first objection raised by plaintiffs, is, that the writ of garnishment issued against them without a sufficient showing of a joint liability, and the case of *Thorn & Robins vs. Woodruff et al.* 5 *Ark. R.* 55, is referred to as authority in point. That case however was but little analogous to the present. Though the writ was joint, the allegations and interrogatories, and the defence were several. In this case, the writ, allegations and interrogatories are all joint, and show a joint indebtedness, and a joint possession of goods, chattels, &c. and no defence was made. We conceive therefore that the garnishor did every thing necessary for him to do to show the joint lability of the garnishees.

The plaintiffs contend in the next place that service of the writ on them as garnishees was void, because it was executed on the return day thereof. We can perceive no reason why a writ of garnishment should lose its force and efficacy sooner than any other writ. Others, it is settled, are in life and force until the expiration of their return days. The levy of an execution on its return day is good. *Vail vs. Lewis & Livingston,* 4 *Johns. R.* 450, and service of a *latitat* at eight o'clock in the morning of its return day was held good. *Robertson vs. Douglas,* 1 *D. & E.* 191. In one case it was held a good service at eleven on the night of the return day of the writ. *Wepburn & Neale* cited in *Bur.* 813. From reason and analogy, therefore, we think the service of the writ regular and valid, and its not being executed ten days before the return day thereof but entitled the garnishees to a continuance.

The objection that in reciting the premises for the judgment against the garnishees, the day of the month on which the judgment was rendered against Everett was mistaken, does not merit grave consideration. It is obviously a mere misprision of the clerk and is immaterial. If it were otherwise, however, it would be unavailing to the plaintiffs; for it is an error that in no wise affects their interests.

The plaintiffs also contend that the record must show the filing of the allegations and interrogatories. The statute does not require

them to be filed in court, and consequently it is not necessary that their filing should appear on the record. They may be filed with the clerk any time after the issuance of the writ, and before the expiration of its return day. *Rev. St.* 425, *sec.* 3. Plaintiffs farther insist that the suit was discontinued by not being regularly entered on the record and continued from term to term. The statute expressly provides that no suit or cause shall "be discontinued or abated by the failure of any term or session of any court, nor by the failure to enter continuance on the record, but the same shall be continued and proceed as if no such failure had happened. *Rev. St.* 234. We have been unable to detect any material error in the judgment and proceedings of the circuit court. The judgment is therefore affirmed.